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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/761,322	01/16/2001	Robert F. Gehan	NBI-855A	4644
4955	7580	12/02/2003		
WARE FRESSOLA VAN DER SLUY & ADOLPHSON, LLP BRADFORD GREEN BUILDING 5 755 MAIN STREET, P O BOX 224 MONROE, CT 06468			EXAMINER	
			TRAN LIEN, THUY	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 12/02/2003				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	09/761,322	GEHAN ET AL.
	Examiner Lien T Tran	Art Unit 1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 22 September 2003.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-13 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

- 11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

- 12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
 - a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) Interview Summary (PTO-413) Paper No(s) _____.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____

Claims 1-3, 5-9 and 11-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Persson in view of Blaschke et al for the same reason set forth in the previous office action.

Claims 4 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Persson in view of Blaschke et al and further in view of Pappas et al for the same reason set forth in the previous office action.

In the response filed Sept. 22, 2003, applicant argues the references are not combinable and even if they are combined, the process of Persson requires a lot of work and cannot be accomplished on conventional cookie forming equipment. This argument is not persuasive. The examiner respectfully disagrees with applicant that the references are not combinable. Cookies and candy are common treats to children. Thus, what is playful and novel to one product is equally playful and novel to the other. In fact, there are many types of cookies which include candies to make them appealing to children. Cookies that are intended for children come in many different shapes, designs, flavor, etc... One needs only to look in a cookie cookbook for kids to see this. For example, there are cookies that shape as turtle, dinosaur, fish; there are cookies that have candy on the surface or candy hidden in the dough; there are cookies that have treat covered under a coating of chocolate etc... Thus, having the teaching of Persson and Blaschke et al , it would have been obvious to one skilled in the art to incorporate the teaching of Persson in making the cookie of Blaschke et al to make an appealing cookie when such product is intended for children. As to the argument about the Persson process being unsuitable for conventional cookie forming equipment,

applicant has not submitted any evidence to show this. Applicant further argues the conversion of the Persson product to all cookie would fully change the nature and construction of the product. It is true that such conversion fully changes the product because cookie is different from candy. The question to be answered is that would such conversion have been obvious to one skilled in the art. It is the examiner's position that such conversion would have been obvious to one skilled in the art when one wants to make a cookie product with playful feature which is intended to appeal to children. Applicant argues the Persson reference fails to recognize the features (a-d) pointed out on page 5 of the remark. This point of this argument is not clear.

Applicant's claims do not exclude the steps disclosed by Persson. The picture of Persson can resemble a television set; thus, the image can be in three dimensional form. Applicant argues the rejection is based on impermissible hindsight. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant's arguments filed Sept. 22, 2003 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Tuesday, Wednesday and Friday. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

November 18, 2003

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700